1953

State of Utah et al v. Fred Tedesco et al : Brief of Defendant and Respondent Bird & Evans, Inc.

Utah Supreme Court

7939

In the Supreme Court of the State of Utah

STATE OF UTAH, by and through its ENGINEERING COMMISSION, D. H. WHITTENBURG, Chairman, H. J. CORLEISSEN and LAYTON MAXFIELD, Members of the Engineering Commission,

Plaintiff and Appellant,

vs.

FRED TEDESCO and KLEA B. TEDESCO, his wife, et al,

Defendants,

and

BIRD & EVANS, INC.

Defendant and Respondent.

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BRIEF OF DEFENDANT AND RESPONDENT BIRD & EVANS, INC.

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INTRODUCTION

This matter comes before the Court on an intermediate appeal granted to the State of Utah after a jury had been

chosen and the presentation of evidence had begun in the court below. The questions to be determined by this Court are:

1. Does the respondent, Bird & Evans, Inc., have a legal remedy for the damages which it has suffered and which are the subject of this action; and

2. Has the respondent, Bird & Evans, Inc., proceeded properly to secure legal redress for these damages.

STATEMENT OF FACT

The statement of fact as presented by the appellant is accurate so far as it pertains to the quotation of the statutes condemning or directing the condemnation of the land for "This is the Place" Monument.

The appellant fails, however, to mention in its Statement of Facts the interesting history of legislation concerning "This is the Place" Monument in the Second Special Session of the Twenty-Ninth Legislature in June of 1952. These facts are important as they bear upon the intention of the Legislature in regard to the condemnation of Kennedy Drive.

H. B. No. 3 of the Second Special Session provided in Section 1 thereof:

> "The action taken by the Engineering Commission in condemning the land in the vicinity of "This is the Place" monument for state park purposes pursuant to the provisions of Chapter 75, Laws of Utah, 1951, as amended my Chapter 13, Laws of Utah, 1951, First Special Session, and more particularly, its action in not

condemning public utility easements and that portion of Kennedy Drive embraced within the limits of the park area is approved and ratified.*

When H.B. No. 3 came before the House of Representatives on the third reading, Section 1 above quoted was by amendment deleted from the Bill in its entirety and the remaining Sections renumbered accordingly. (Page 20, Journal of the House of Representatives Second Special Session of the Twenty-Ninth Legislature.)

Immediately thereafter H.B. No. 3 was withdrawn and H.B. No. 5 was substituted in its place. H.B. No. 5 contained all of the salient points of H.B. No. 3 except the reference to Kennedy Drive. It even grants to the State Engineering Commission authority to grant easements across the condemned property for public utilities which provision had been stricken from H.B. No. 3 along with the reference to Kennedy Drive. H.B. No. 5 was thereupon passed by the Legislature, signed by the Governor, and became a statute of the State of Utah.

ARGUMENT

POINT ONE

THIS ACT IS NOT BARRED BY THE PROVISIONS OF RULE 13 (a), UTAH RULES OF CIVIL PROCEDURE.

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* Actually Kennedy Drive was condemned, because the description contained in the Legislative Act, in the Resolution of the Engineering Commission, and in the Complaint filed, included Kennedy Drive and made no exception therefor.

The appellant makes the contention that the action of Bird & Evans, Inc., for damage to the upper property is cut off because of the fact that Bird & Evans, Inc., did not file its counter-claim or cross-complaint alleging damages to the property prior to the time the hearing of the court was had fixing the value of the property specifically described in the Complaint. The respondent does not feel that this position is well taken. The Compulsory Counter-Claim Rule has two fundamental bases. First to conserve the time of the court by handling in a single hearing as many issues as can properly be handled, and Second so that if there are justified off-setting claims between the same parties, these claims can be set-off one against the other to result in a lower single judgment rather than in two separate judgments running in different directions between the two parties. Neither of these reasons is applicable here. Although there is only one law suit bearing a single number covering all lands involved in the "This is the Place Monument" action, because of the fact that the issues as to the various parcels were so diversified and would be so confusing to a single jury, the court has conducted numerous hearings under the same case, grouping the matters that had the greatest points in common in a single hearing. Even if the counter-claim had been on file and at issue at the time of the hearing assessing the value of the first piece of property, it would not have been heard by the court at that time because of the fact that the issues were so different; and, as indicated above the segregation by the judge of this case into various trials, was a segregation as to issues, rather than as to parties defendant. The time of the court therefore would not have been conserved at all by the procedure suggested by the appellant.

The second reason for the compulsory counter-claim rule is equally inapplicable here. There are not and could not be two judgments running in different directions between the parties to this action. Although the State is designated as party plaintiff in a condemnation action, the judgment actually runs in favor of the defendants. In this case, therefore, if two judgments were rendered, one as to the value of the land actually taken and one for damages to the land not taken, both judgments would run against the State and in favor of Bird & Evans, Inc. There could, therefore, be no off-set.

The attention of the court is further called to the fact that this cross-complaint was filed in the same action and before the action had been disposed of. At the time the Bird & Evans, Inc., cross-complaint or counter-claim was filed, although a hearing had been had as to the value of the Bird & Evans, Inc., property actually taken, (which property was neither adjacent to nor in close proximity to Kennedy Drive or to the property of the respondent involved in these proceedings and which was damaged by the condemnation of Kennedy Drive) there were many hearings yet to be conducted in the same case. The case was, therefore, very much alive and the counter-claim is filed in the same case as that originally brought by the State.

This situation is clearly covered by sub-section (e) of Rule 13 which states:

> "When a pleader fails to set up a counter-claim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counter-claim by amendment."

Certainly in this case the interests of justice required filing of the counter-claim, as without the counter-claim it may well have been that under the case of Hjorth v. Whittenburg, 241 Pac. (2d) 907, Bird & Evans, Inc. might have had no remedy except to petition the Board of Examiners, which matter will be discussed later in this brief. Clearly it appears therefore, that the matter of setting up counterclaims by amendment in the same action before the action had been finally terminated, is within the discretion of the trial court. The trial court permitted such a filing in this case and proceeded to trial thereon, as it clearly had the right to do under the rule quoted above.

POINT TWO

THE STATUTE AND THE FILING OF THE COMPLAINT CONSTITUTE A CONDEMNATION OF KENNEDY DRIVE.

(a) *The language of the statute clearly indicates such intent on the part of the Legislature.*

The attention of the court is called to the fact that the Act of the Legislature, as amended by the First Special Session of 1951, leaves no discretion within the Road Commission as to whether or not it shall condemn certain lands described therein. The Commission is directed to proceed to condemn the described lands which include Kennedy Drive, and is given discretion as to certain other lands. Pursuant to this mandate the Engineering Commission did file a complaint in its condemnation of the mandatory lands not excluding therefrom

Kennedy Drive. The court did not rule, as the appellant has maintained, that the Legislature's Act in itself constituted a condemnation. Although respondent feels that such a ruling would have been justified, the court held that the enactment of the statute plus the resolution of the engineering commission and the filing of the complaint constituted the act of condemnation. This is clearly indicated by certain language of the court which has been entirely omitted from the Statement of Fact of the appellant. The language of the court in making its ruling is found at page 91 of the record and reads as follows:

"Mr. Rampton: "We would like the Court to take judicial notice of the act of the Legislature and to take notice of the resolution of the Road Commission, which is pleaded in full in the complaint and, based upon that, to make an order to the effect that the lands embraced therein, including Kennedy Dricve, have been condemned." * * *

"The Court: The order as indicated by Mr. Rampton will be granted."

It may be conceded that as a general rule the Legislative Act in and of itself is not an act of condemnation because as a usual thing no specific land is described in the statute, but a considerable discretion is left to the administrative agency charged with the taking of the property. As pointed out above, such is not the case here. The administrative agency was directed to condemn certain described land. In this regard the following language is found in Nichols on Eminent Domain (6.13):

> "The mere passage of legislation authorizing the acquisition of property by eminent domain is ordinarily not sufficient, in and of itself, to constitute a taking. Where, however, the provisions of the statute and the circumstances under which the appropriation is to take place are such as to indicate that the purpose of the law was to effect a taking by virtue of the statute itself, it has been held that a statute may be so construed as to vest title in the condemner upon the mere passage of the law."

In Lewis on Eminent Domain at page 375 it is stated:

> "It is competent for the legislature to appropriate property directly by an act duly passed, instead of confering authority to do so, and this has occasionally been done."

The attention of the court is called to the fact that the property in this case had been acquired by the land owner for the purpose of sub-dividing for sale as residential property and indeed at the time of the condemnation the property had been platted and the owner was proceeding with sub-division work. The minute the act in question was passed the land became worthless as sub-division lots. No person intending to build a house would buy a lot where the only access road to the lot was encompassed in land which the Legislature, by a statute, had directed to be taken for public park purposes. Granted the land still had some value. A sub-division speculator might still buy the land at some price in the hope that access to the area would some day be made possible through the opening of Kennedy Drive or other streets into the area. However, without question, the value of the land for sale as sub-division lots was materially reduced by the action of the Legislature.

The same question arose in the case of Chelten Trust Co. v. Blankenburg, Pa., 88 Atl. 664. There a city ordinance declared that a certain tract of land had been selected and appropriated for park purposes. In holding that the act of the City Council in effect amounted to a taking, the court stated:

> "Appellees' land was practically taken and appropriated by the ity of Philadelphia, the day the ordinance was passed . . . The land cannot be built upon or improved except at the hazard of the improver and it is worthless for sale."

Another case almost directly in point with the case now before the court is the case of People ex rel Canavan v. Collis, 46 N.Y. Supp. 727. There the Legislature adopted a certain statute regarding certain described lands and declared them to be a public parkway and required the municipal authorities of the City of New York at once, in the manner described in the act, to condemn the property and have the value appraised. The court pointed out that this New York Statute, as in the case of the Utah statute now before this court, provided a complete scheme for the condemnation of the property and the payment to owners. The court stated:

> "From the time of the passage of the Act and certainly from the time when the lands therein were located by the filing of the map, they were fully appropriated and set apart for public use, and the duty of taking proceedings to appraise their value arose . . . The law gave to the municipal authorities of the City of New York no locus poenitentiae, or right to discontinue the proceedings, but the statute made it obligatory upon them not only to take the proceedings for condemnation, but to pursue them to a final report.

> The case is not one where it lay in the discretion of the Commissioner of Public Works or the Department of Public Works whether or not to take the land, or whether or not to continue proceedings which had once begun for the condemnation of land; but the taking of this land was the act of the legislature, and the absolute duty of having it appraised was imposed upon the city, without any right or power to discontinue it. The rights of the parties, so far as the taking of the land is concerned, were fixed by the statute."

To like effect see McMormock v. City of Brooklyn, 14 NE 848, and Mott et al v. Eno, 74 N.E. 229.

The appellant has cited the United States Supreme Court case of Danforth v. United States, 308 U.S. 271; 84 L. Ed. 240, 246 and 247; 60 S. Ct. 231, to the effect that a legislative act does not constitute condemnation. An examination of this case will definitely indicate that it is not in point. The court states:

> "The mere enactment of legislation which *authorizes* a condemnation of property cannot be a taking."

In this case, however, we do not have an act authorizing condemnation, we have a statute directing it. In his dissenting opinion in the case of Madisonville Traction Co. v. St. Bernard Min. Co., 196 U.S. 239, 25 S. Ct. 251, 258; 49 L.Ed. 462, quoted with approval of Judge Wolfe in the case of State v. District Court, Fourth Judicial District, 78 Pac. (2d) 502, Justice Holmes stated:

> "The fundamental fact is that eminent domain is a prerogative of the state, which, on the one hand may be exercised in any way that the state thinks fit, and on the other may not be exercised except by an authority

which the state confers. *The taking may be direct, by an act of the Legislature . . .*"

The appellant also contends that it was never the intention of the Legislature to condemn Kennedy Drive. While no one can say for sure what was in the minds of various legislators, the only assumption to be drawn from the language of the legislators was that such was their intention. Kennedy Drive is definitely encompassed within the tract of land described. The Engineering Commission is directed, without the exercise of any discretion on its part, to proceed to condemn such land. Furthermore, as has been pointed out above, the Engineering Commission made an effort to have Kennedy Drive deleted from the description of the property. This provision was embraced in a bill introduced in the Legislature, which bill contained a number of other provisions affecting the Monument property. The bill was finally passed substantially as introduced, except that the provision exempting Kennedy Drive from the provisions of the condemnation statute was stricken by amendment. Certainly this shows an affirmative intention on the part of the Legislature that Kennedy Drive should not be excepted.

Generally, it may be said that the land encompassed within the description contained in the statute falls into three categories so far as ownership is concerned.

(a) That land belonging to private owners which certainly the Legislature intended to condemn and which the State has proceeded to take and pay for.

(b) The land across which ran State Road No. 65, which already belonged to the State and which there

would be no purpose in condemning as the State could already do whatever it wished with the land; and

(c) The city and county streets encompassed within the area, including Kennedy Drive.

As pointed out above, the argument that if the Legislature intended to condemn Kennedy Drive it also intended to condemn State Road No. 65 is without force or effect whatsoever. Why would the State proceed to condemn land which already belonged to it? If it did intend to proceed with the condemnation, what effect would it have? The answer is obvious — none whatever. If the State wanted to devote the land currently used for highway purposes for park purposes, it could do so without an act of condemnation, although by so doing it might subject itself to some liability, but certainly a condemnation action was not necessary.

In regard to the city and county streets, however, if the State was to acquire title, a condemnation action was necessary as the title was vested elsewhere. It was obviously the intention of the State to acquire a large tract of land for park purposes. The land, prior to the condemnation act, consisted of individual building lots plus numerous streets serving such lots for residential purposes. Obviously no park could be built on an area cut up by such streets. An examination of the map attached to appellant's Brief will show that in addition to Kennedy Drive, lands belonging to the city or county were lands traversed by Oakhills Drive, Crestwood Drive, Oakwood Drive, Oakwood Circle and a number of other streets not shown on that plat. What is there to indicate that the Legislature had any different intention toward Kennedy Drive than it had toward

Crestwood Drive or Oakhills Drive? The ownership of all these lands was in a party other than the State. They had all been dedicated to the county by the same instrument. All of them provided possible access to land lying east of the Monument property. If the Legislature did not intend to condemn these roadways, then it did not intend to condemn a continuous area for park purposes, but rather it intended to take a number of small disconnected pieces. Such can obviously not be the case. Whether or not the Legislature realized that by condemning these county or city roads it might be cutting off property owners to the east from their property, we cannot know, but certainly it could not have intended that such roadways be exempted from the condemnation suit, otherwise, as pointed out above, it would not have the continuous area for park purposes that was obviously desired.

As a further evidence of the legislative intent, we call attention to the fact that the primary act directing the taking of the properties for "This is the Place" Monument park, passed by the general session of the Legislature in 1952 and which included the area comprising Kennedy Drive in the description of the land to be taken, stated that one of the purposes of taking the property was to preserve "the natural beauty of the area surrounding" the monument. The Legislature subsequently authorized the Engineering Commission to sell and remove from the area the beautiful and expensive homes which had been erected thereon. The inference to be drawn from this is a legislaitve intent to eliminate improvements of every nature which had been placed upon this property, including roads placed thereon. This conclusion is inescapable in view of the fact that, as pointed out above, the

question of excepting Kenndey Drive from the land to be condemned was expressly called to the attention of the Legislature and it declined to make such an exception.

(b) *The Legislative Act and the Resolution of the Road Commission Established the Necessity for Taking.*

The appellant raises the point that there had never been a determination that the use of the land for park purposes was a higher use than for use as a public way. Likewise that there has never been a determination by the court as such that the establishment of the park was in the public interest.

In support of this position appellant cites the case of Town of Perry v. Thomas, 22 Pac. (2d) 343, ignoring entirely the fact that the Court there held that the resolution of the Road Commission, in the absence of fraud, is conclusive evidence of the necessity of taking. The language of the Court is as follows:

> "Under powers thus delegated to municipal boards the necessity, expediency, or propriety of opening a public street or way is a political question, and in the absence of fraud, bad faith, or abuse of discretion the action of such board will not be disturbed by the courts. 10 R.C.L. 183, 184; 4 McQuillin or Municipal Corporations (2d Ed.) 367; 20 C.J. 559, 627, 972; Postal Tel. Cable Co. v. Oregon S.L.R. Co., 23 Utah, 474, 65 P. 735, 90 Am. St. Rep. 705; City of Grafton v. St. Paul, M. & M. R. Co., 16 N. D. 313, 113 N. W. 598, 22 L.R.A. (NS) 1, and notes; City of Los Angeles v Waldron, 65 Cal. 283, 3 P. 890; City of Seattle v. Byers, 54 Wash. 518, 103 P. 791; Grangeville Highway Dist. v. Ailshie, 49 Idaho, 603, 290 P. 717."

In this very action the Attorney General's office, acting for the State of Utah, has proceeded to condemn extensive tracts of land, introducing no other evidence as to the necessity of the taking than the statute and resolution of the Road Commission itself. It is now trying to blow hot and cold in the same case. In fact, it has switched its position on this very point since the case was argued before Judge Van Cott. There, when the matter came up as to whether or not the resolution and the statute were evidence of the necessity for taking, Mr. Quentin Alston, representing the State, said:

> "I think the resolution presents a prima facie case, Your Honor." (P. 84 Transcript).

If the resolution supported by the staute made a prima facie case as to the other pieces of land embraced within the condemnation action, certainly it made a prima facie case as to all lands embraced therein, and whether or not the legislative act itself was a condemnation, certainly based upon such resolution, the court had the power to enter an order of condemnation, which it did.

In this regard the following language is found at 2 Nichols on Eminent Domain, page 908:

> "It is equally obvious that as there is no fixed principal which decides what public improvements shall be undertaken and where they shall be located, these questions must be settled by some department of the Government. It does not, however, follow merely because such questions are often open to doubt and because evidence and argument might be of assistance in coming to a decision, that they are necessarily judicial

and must be passed upon by the courts. Just as it is exclusively in the power of the Legislature except so far as it is limited by the provisions of the constitution to provide what police regulations shall be enacted, what taxes shall be levied and what the duties of the various public officers shall be, so it is within the exclusive jurisdiction of the same body to determine what public improvements shall be constructed, where they shall be located and where the power of eminent domain shall be employed at acquire the necessary title. *Where the Legislature authorizes the exercise of eminent domain in a particular case, it is necessarily adjudicated that the land to be taken is needed for the public use and no other or further adjudication is necessary.*"

As further answer to appellant's argument in this regard, we point out the fact that Sec. 78-34-4 (3) relied upon by appellant is but a statutory provision covering the procedure for the taking of property under the general condemnation laws of the state, and cannot control these proceedings which are based upon special acts of the Legislature. In fact, if there is any conflict between that section and the special acts directing the taking of the lands affected by these proceedings, the provisions of Sec. 78-34-4 (3) must yield to the later and specific statutes directing the condemnation of the property for "This is the Place" Monument park.

POINT THREE

RESPONDENT HAS PURSUED ITS PROPER REMEDY TO OBTAIN REDRESS FOR ITS DAMAGES.

The appellant did not maintain in the Court below, nor did it maintain in its brief to this court that, if the respondent's right of access to its property is actually interferred with by the condemnation action, there has not been a taking or damaging within the contemplation of Article 1, Section 22 of the Constitution of the State of Utah. That the respondent has been damaged is quite clear. It is true that up to the present time Kennedy Drive has not been physically closed, and that all persons have been permitted to drive over it. This, however, has been a permissive thing, the right of respondents and others to use said street having been taken from them by the taking of the property described in the Complaint in this action.

As has been pointed out above, Birds & Evans, Inc., were proceeding to sub-divide these lots for sale as sub-division property. As such, and if served by a city street, they had a very substantial value for residential purposes. However, as quickly as the right of access was taken away and access remained purely on a permissive basis, the lots had no value at all for residential purposes.

Let us suppose that a prospective purchaser wished to buy a lot for construcing a home, which lot was entirely surrounded by property belonging to another individual. Let us further suppose that with a right of way across the lands of the other individual, the prospective buyer was willing to pay $10,000.00 for the residential lot. Let us suppose further that rather than granting a right of way across his other property, the property owner merely said, "I will give you permission to go across my property to get to your lot, such permission to be revocable by me at any time. I may never revoke it and so you will prob-

ably always have access." Under such circumstances no person would buy such a lot for residential use as he would not feel safe in constructing a house on it. This is the situation in regard to the Bird & Evans, Inc., property. Prior to the condemnation action, the land had a certain value for residential purposes, while after the right of access became in doubt, it had no value for such purposes except a speculative value. Certainly we would not be entitled to a judgment for the value of the land as would be the case if the land were actually taken, because we still have the land and it still has some value. Access up the side of the mountain could be had to it for the purpose of grazing goats, and it would have some value for this purpose. Furthermore, it is probable that a person wishing to buy it for speculation for residential purposes would pay some figure more than a pasture land value on it in the hope that sometime in the future Kennedy Drive would be reopened or that streets would be opened into it from some other source.

The measure of our damages is the difference between what a willing buyer would pay for the tract for its highest and best use before the condemnation action and what he would pay for it after the condemnation action. Nor have our damages been nullified or our right taken away by the fact that the last session of the Legislature did in fact reopen Kennedy Drive. As a legal proposition this makes no difference. The following language is found at Vol. 18 of American Jurisprudence, Sec. 280:

> "The right to damages becomes perfect when the street is vacated, and cannot be diminished by any action which the plaintiff may, in the future, take for the purpose of mitigating the injuries done to him, as,

for example, by his subsequently opening streets on his land by means of which access and egress to and from they may be had."

This matter was before the Supreme Court of Washington in the case of Fry v. O'Leary, 252 Pac. 111, where the court held that when a street was vacated, the right of the owner to damages became vested and the fact that other access was later acquired made no difference.

As a practical matter we still have suffered severe damages. We have suffered the damage of being delayed two years in the development of the sub-division. Our money has been tied up in the land for this period of time and it may be that the evidence will show a diminution in value of residential property over that period of time.

Taking then the proposition that we have been damaged within the contemplation of the constitution, the last question arises as to whether we have taken the proper legal steps for the redress of these damages. This court has recognized in the cases of State v. District Court, Fourth Judicial Dist., 78 P. (2d) 502 and the case of Hjorth v. Whittenburg, 241 P. (2d) 907, the doctrine of the non-suability of the sovereign. While counsel feels that this is an outmoded doctrine held over from the theory of the divine right of kings, nevertheless, it appears to be well established in our law. It may further well be the law as set forth by Judge Wolfe in his dissenting opinion in State v. District Court, Fourth Judicial Dist. 78 P. (2d) 502, that the mere fact that the constitution gives a right of action in cases of property not taken, does not imply a consent of the state to be sued and that in many cases the

only remedy for the injured party is by appeal to the Board of Examiners.

However, equally well established with the doctrine of the non-suability of the sovereign is the doctrine that when the sovereign itself invokes the jurisdiction of the court, it becames subject to the jurisdiction of the court in all matters properly cognizable by the court in such an action. The sovereign cannot use the court as a sword to obtain its rights and then in the same matter retire behind the shield of sovereign immunity when it wishes to escape the consequence of its original invocation of the court's jurisdiction. Here the state did invoke the jurisdiction of the court to aid it in its condemnation of the property concerned. Had Bird & Evans, Inc., not been a party defendant to the original action, they had a statutory right to intervene in the action to get redress for any damages they sustained from the action. Section 78-34-7, U.C.A., 1953, provides:

> "All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in the same manner as if named in the complaint."

In this case, however, Bird & Evans, Inc. were already parties to the suit and intervention was not necessary. They sought relief by means of a counterclaim or cross-complaint, whichever term is proper to apply to the pleading.

Sec. 78-34-10, Utah Code Annotated, 1953, contemplates having the court award damages against the state in con-

demnation actions for damages to property, no part of which is taken. Only where the state has not invoked the jurisdiction of the court, as was true in the case of State v. District Court, Fourth Judicial District, 78 Pac. (2d) 502, or in cases where the injured parties have not by a timely action, had their damages assessed in the condemnation action, as was the case of Hjorth v. Whittenburg, 241 Pac. (2d) 907, does the appeal to the Board of Examiners become the exclusive remedy. The statutory section above cited provides:

> "The Court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:
>
> (1) The value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein; and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.
>
> (2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will acrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.
>
> (3) *If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages . . .*"

Attention of the court is called to the fact that this section is not permissive, but mandatory. It states: "The Court, jury or referee *must* hear such evidence as may be offered by any of the parties to the proceedings, and thereupon *must*

ascertain and assess" the compensation and damages.. To what else could sub-section (3) of the above quoted statute apply than to a case like that now before the court? It is certain that the State itself would never set up in its complaint in a condemnation action that it was injuring property, no part of which was taken. As has been very clearly pointed out by Judge Wolfe in his dissenting opinion in State v. District Court, Fourth Judicial District, 78 Pac. (2d) 502, neither the State nor the court could know with certainty what individuals might be damaged where no part of their property was being taken. Therefore, if sub-section (3) is to have any application at all, it must apply to those cases where the owners of the property, by appropriate pleading, have brought before the court the fact that they have been damaged. This the respondent has done in this case. It has set up a counter-claim or cross-complaint right in the condemnation action itself. The State has invoked the jurisdiction of the court. The statute provides for the redress of the damages by the court to the owners of the property injured, but not taken. Certainly, therefore, we are properly before the court and need not rely upon the Board of Examiners for redress of our injuries.

CONCLUSION

The respondent feels and urges upon the court that the act of the Legislature in this case in itself constituted a taking of Kennedy Drive and a damaging of its property. If the legislative act standing alone did not do that, then certainly the legislative act, plus the filing of the action would have that

effect. If the court will not go this far, then certainly it cannot be doubted that the legislative act, plus the filing of the action, plus the order of the district court ordering condemnation in compliance with the mandate of the Legislature and the resolution of the Engineering Commission, constituted such condemnation. If it did not accomplish that in regard to Kennedy Drive, then it did not accomplish it in regard to any of the lands and the State has not properly taken any of the property for the monument site. It is true that in this case the defendants rather than the State urged upon the court the entry of the order of condemnation on the basis of the statute and the resolution. This, however, was done not to create a cause of action, but because it was felt by counsel that this offered the only method of securing judicial redress for an injury already done.

The respondent has suffered substantial damage as a result of the condemnation of the monument property. They have applied for redress in a case in which the State itself has invoked the jurisdiction of the court. It is submitted that the action of the lower court should be sustained and the lower court should be permitted to proceed with the assessment of the respondent's damages under the provisions of Sub-section (3) of 78-34-10, U.C.A., 1953.

Respectfully submitted,

PUGSLEY, HAYES & RAMPTON

Attorneys for Defendant and Respondent, Bird & Evans, Inc.